

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

MICHAEL DEMIL, an individual,

Plaintiff/Counter-Defendant,

HENRI JAMES DEMIL, an individual, SARAH  
MAE DEMIL, an individual, HANNAH RENE  
DEMIL, an individual and SAVANNAH LYNN  
DEMIL, an individual

Plaintiffs,

vs.

Case No. 2012-889-CK

RMD HOLDINGS, LTD, a Michigan corporation  
and ROBERT E. DEMIL, an individual,

Defendants/Counter-Plaintiffs.

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OPINION AND ORDER

Defendant Robert Demil has a motion for summary disposition of Plaintiff Michael Demil's accounting and dissolution claims pursuant to MCR 2.116(C)(10). Plaintiff Michael Demil has filed a response and requests that the Court deny Defendant's motion and grant summary disposition in his favor pursuant to MCR 2.116(I)(2).

*Factual and Procedural History*

This matter involves alleged shareholder oppression and other corporate governance matters. Defendant RMD Holdings, Ltd. ("RMD") is a fencing contracting business. When RMD was formed, Defendant/Counter-Plaintiff Robert E. Demil ("Defendant R. Demil") and Plaintiff/Counter-Defendant Michael J. Demil ("Plaintiff M. Demil") received all of the voting stock, with Defendant R. Demil holding 51% and Plaintiff M. Demil holding the remaining 49%. The remaining Plaintiffs are all non-voting shareholders of RMD.

On March 22, 2013, Plaintiffs filed their second amended complaint in this matter asserting claims for: Count I- Shareholder Oppression under MCL 450.1489; Count II- Breach of Fiduciary Duty; Count III- Breach of Contract; Count IV- Accounting; Count V- Violation of the Whistleblower's Protection Act and Count VII- Dissolution. In addition, Defendants have filed a counter-complaint against Plaintiff M. Demil for breach of fiduciary duty.

On June 28, 2013, Plaintiff M. Demil filed a motion for partial summary disposition of Defendants' counter-claims and Plaintiffs filed two separate motions seeking summary disposition of their shareholder oppression claim. On September 25, 2013, Defendants filed joint responses to the motions.

On June 28, 2013, Defendant R. Demil filed a motion for summary disposition of Plaintiff's claims for an accounting and dissolution. On September 25, 2013, Plaintiff filed a response to the motion requesting that the motion be denied and that summary disposition be entered in his favor. On October 2, 2013, Defendant R. Demil filed a reply in support of his motion.

On October 7, 2013, a judgment in favor of all Plaintiffs other than M. Demil was entered to reflect the parties' acceptance of case evaluation as to those Plaintiffs' claims. As a result those Plaintiffs have been dismissed from this matter.

The Court has since held hearings in connection with the pending motions. At the conclusion of the hearing the Court took the motions under advisement. The Court has reviewed the materials submitted by the parties and is prepared to make its decision with respect to Defendant R. Demil's motion for summary disposition of Plaintiff M. Demil's accounting and dissolution claims.

#### *Standards of Review*

A motion under MCR 2.116(C) (10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

#### *Arguments and Analysis*

##### 1) Count IV (Accounting)

In this case, document discovery was completed on May 31, 2013 and all motions to compel have been resolved. Nevertheless, Plaintiff contends that his accounting claim is necessary in order for him to have access to vital RMD company information because he can no longer obtain documentary discovery. An accounting is only necessary where discovery is insufficient to determine the amounts at issue. *Cyril J Burke, Inc v Eddy & Co Inc.*, 332 Mich 300; 51 Nw2d 238 (1952). Plaintiff contends that the financial stability and condition of RMD will remain relevant through the final disposition of this matter. Accordingly, Plaintiff contends that an accounting may be necessary in order to permit access to necessary records given that discovery has closed. However, Plaintiff has not identified any specific documents that he was unable to access during discovery and there is nothing preventing the Court from, in its discretion, re-opening discovery for a limited purpose should the need arise or precluding Plaintiff M. Demil from exercising his statutory right to inspect RMD's books and records.

Moreover, if Plaintiff obtains the dissolution he has requested RMD will be divided according to the respective interests based on the value of RMD's assets at the time of dissolution. In that event, an accounting will need to be conducted in order to properly dissolve the corporation. For these reasons, the Court is convinced that Defendant R. Demil's motion for summary disposition of Plaintiff M. Demil's accounting claim must be granted.

2) Count VI (Dissolution)

Plaintiff M. Demil's dissolution claim is based on MCL 450.1823, which provides:

A corporation may be dissolved by a judgment entered in an action brought in the circuit court of the county in which the principal place of business or registered office of the corporation is located by 1 or more directors or by 1 or more shareholders entitled to vote in an election of directors of the corporation, upon proof of both of the following:

(a) The directors of the corporation, or its shareholders if an agreement among the shareholders authorized by section 488 is in effect, are unable to agree by the requisite vote on material matters respecting management of the corporation's affairs, or the shareholders of the corporation are so divided in voting power that they have failed to elect successors to any director whose term has expired or would have expired upon the election and qualification of his or her successor.

(b) As a result of a condition stated in subdivision (a), the corporation is unable to function effectively in the best interests of its creditors and shareholders.

Defendant R. Demil, in his motion, contends that as the 51% shareholder of RMD he controls RMD's board of directors and is able to take action without a meeting or prior notice. In support of his contention, he relies on RMD's December 5, 1990 "Stock Subscription Agreement" ("Stock Agreement"), RMD's articles of incorporation, and RMD's bylaws.

The Stock Agreement provides that Plaintiff M. Demil holds 49% of RMD's Class A Common Stock and Defendant R. Demil holds 51% of RMD's Class A Common Stock. (*See* RMD's Stock Agreement, at 4-5.) Further, Article VII of RMD's Articles of Incorporation provides:

Any action required or permitted by the Act to be taken at an annual or special meeting of shareholders may be taken without a meeting, without prior notice and without a vote; if a consent in writing, setting forth the action so taken, is signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take the action at a meeting at which all shares entitled to vote thereon were present and voted.

Prompt notice of the taking of the corporate action without a meeting by less than unanimous written consent shall be given to shareholders who have not consented in writing. (*See* RMD's Articles of Incorporation, at pg. 3.)

Accordingly, Defendant R. Demil contends that because he holds over half of RMD's outstanding voting stock he is authorized to take any action by consent, without a vote or notice. However, Article III (d) of RMD's amended articles of incorporation and Stock Agreement provide:

The Articles of Incorporation of RMD Holdings, Ltd. shall further be amended to provide that the determination of wages, salaries bonuses and fringe benefits paid directly to a shareholder of record must be approved by the unanimous vote of all owners of common stock of RMD Holdings, Ltd. prior to the payment of said compensation. (*See* Exhibits C and D to Defendant R. Demil's motion for summary disposition.)

It is undisputed that the only two holders of common stock in RMD are Plaintiff M. Demil and Defendant R. Demil. While Defendant R. Demil has continued to make salary determinations without consulting Plaintiff, such actions are in clear violation of the Stock Agreement and RMD's Articles of Incorporation. In support of his motion, Defendant R. Demil contends that he has kept all compensation for shareholder employees the same as it was the last time it was approved by Plaintiff M. Demil. Further, Defendant R. Demil contends that deciding to keep the compensation the same each year does not qualify as a "determination." However, Defendant R. Demil has conceded that he has approved RMD's budget for the last few years without Plaintiff M. Demil's input or approval, and admits that the budget includes his wages, as well as the wages of other shareholder employees. Accordingly, the Court is convinced that

Defendant R. Demil's annual determination as to the wages of shareholder employees was made in violation of the Stock Agreement and amended articles of incorporation.

As discussed above, it is undisputed that Plaintiff M. Demil remains a 49% shareholder of RMD, and under the amended articles of incorporation and Stock Agreement Plaintiff M. Demil has de facto veto power of any decision made by Defendant R. Demil regarding the wages, salaries, benefits and bonuses paid to RMD's shareholder employees, including Defendant R. Demil himself. Given Defendant R. Demil and Plaintiff M. Demil's contentious relationship, the Court is convinced that the parties will remain unable to agree on what compensation should be given to the shareholder employees. Consequently, if it is not dissolved RMD will be placed in corporate paralysis. Specifically, the Court finds that the amount paid to RMD's employees is a material matter respecting the management of RMD's affairs and an inability to make those decisions is not in the best interests of RMD's creditors and shareholders. As a result, the elements of MCL 450.1823 are met and dissolution must be ordered.

### *Conclusion*

For the reasons discussed above:

1) Defendant Robert E. Demil's motion for summary disposition of Plaintiff Michael Demil's accounting claim is GRANTED;

2) Defendant Robert E. Demil's motion for summary disposition of Plaintiff Michael Demil's dissolution claim is DENIED, and Plaintiff Michael Demil's request for summary disposition in his favor is GRANTED;

3) Defendant RMD Holdings, Ltd. is hereby DISSOLVED pursuant to MCL 450.1823.

4) A status conference is hereby scheduled for **Thursday, July 10, 2014 at 10:00am**, at which time the Court and parties will discuss the other pending summary disposition motions and the dissolution of RMD Holdings Ltd.

Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

/s/ John C. Foster  
JOHN C. FOSTER, Circuit Judge

Dated: June 9, 2014

JCF/sr

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